



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 62

[EPA-R01-OAR-2021-0443; FRL-8778-02-R1]

#### **Approval and Promulgation of State Plan for Designated Facilities and Pollutants: New Hampshire; 111(d)/129 Revised State Plan for Existing Large and Small Municipal Waste Combustors**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving the Clean Air Act (CAA) state plan revision for existing large and small municipal waste combustors (MWCs) submitted by the New Hampshire Department of Environmental Services (NHDES) on October 1, 2018. The revised state plan incorporates fuel quality standards and test methods for large MWC facilities that combust processed wood residue (PWR) from construction and demolition (C&D) debris.

**DATES:** This rule is effective on **[Insert date 30 days after date of publication in the Federal Register]**. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of **[Insert date 30 days after date of publication in the Federal Register]**.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA-R01-OAR-2021-0443. All documents in the docket are listed on the <https://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available at <https://www.regulations.gov> or at the U.S.

Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square - Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays and facility closures due to COVID-19.

**FOR FURTHER INFORMATION CONTACT:** Jessica Kilpatrick, Air Permits, Toxics, and Indoor Programs Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Mail Code: 05-2, Boston, MA, 02109-0287. Telephone: 617-918-1652. Fax: 617-918-0652 Email: [kilpatrick.jessica@epa.gov](mailto:kilpatrick.jessica@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

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#### **I. Background and Purpose**

EPA published a Notice of Proposed Rulemaking (NPRM) on September 3, 2021 (86 FR 49501) for the State of New Hampshire. The NPRM proposed approval of the CAA sections 111(d)/129 revised state plan for existing large and small MWCs submitted by NHDES on October 1, 2018.

NHDES amended its state plan Env-A 3300, Municipal Waste Combustion, for existing large and small MWCs on August 11, 2018 to remove a ban on PWR combustion in response to a change in the state statute “Devices Contributing to Air Pollution” RSA 125-C:10. The change in the state statute allows combustion of no more than 10,000 tons per year of PWR at any MWC from

November 15 through April 15 from facilities that process C&D debris in a manner no less stringent than the requirements at 40 CFR 241.4(a)(5), Non-Waste Determinations for Specific Non-Hazardous Secondary Materials When Used as a Fuel. The change also required NHDES to adopt rules regarding fuel quality standards and test methods in accordance with RSA 125-C:6, XIV-a, before any such combustion shall occur; therefore NHDES revised its associated state plan.

Accordingly, the state plan revision incorporates fuel quality standards and test methods for MWCs that combust PWR. It includes changes to Env-A 3300, defining PWR as C&D wood processed from C&D debris according to best management practices as described in 40 CFR 241.4(a)(5). The revision includes a new part Env-A 3308 “Additional Requirements for Combusting PWR” applicable to large MWCs with sections outlining applicability, operating practices, PWR fuel quality, fuel supplier requirements, independent third-party inspections, analysis of composite samples, reporting and recordkeeping for large MWCs combusting PWR, and cessation and resumption of receipt of PWR from a supplier.

Subsequently, NHDES submitted the revised state plan to EPA on October 1, 2018. EPA evaluated the state plan for consistency with the CAA, EPA guidelines, and policy. We determined that NHDES’s state plan implements and enforces provisions at least as protective as the Federal emission guidelines applicable to existing large and small MWCs. NHDES demonstrates legal authority to adopt emission standards and compliance schedules applicable to the designated facilities; enforce applicable laws, regulations, standards, and compliance schedules; seek injunctive relief; obtain information necessary to determine compliance; require record keeping; conduct inspections and tests; require the use of monitors; require emission reports of owners and operators; and make emission data publicly available. Other specific requirements for the revised state plan and the rationale for EPA's proposed action are explained in the NPRM and will not be restated here.

## **II. Response to Comments**

EPA received three comments in response to the NPRM during the public comment period, all of which were adverse in nature to EPA's proposed approval of the action.

The first comment received suggested that EPA consider a different route of waste disposal to minimize negative impacts to the environment and human health. This comment is outside the scope of EPA's proposed action in that EPA is approving New Hampshire's state plan which meets EPA's promulgated guidelines for MWCs. In addition, the comment did not explain, or provide a legal basis for, how the proposed action should differ in any way within the context of EPA's guidelines; nor did the comment specifically mention the proposed action. Finally, the commenter did state that New Hampshire's rule would have a positive impact on the environment and public health. CAA section 129 and its implementing regulations impose requirements on sources that combust solid waste. If a state submits a revised state plan to EPA for solid waste combustion facilities that contains all applicable requirements, EPA does not have the authority to deny the revised state plan in favor of another means or method for solid waste disposal. As such, this comment has not resulted in a change to our original proposal and EPA is finalizing the action as proposed.

Two comments stated that there will be adverse health impacts to surrounding communities as a direct result from combusting PWR (referred to as C&D or C&D waste) at Wheelabrator Concord Company L.P. (Wheelabrator), currently the only facility subject to the New Hampshire state plan. Both commenters directly cited the NPRM's Background Section III entitled, "Why does EPA regulate air emissions from MWCs?," which states that municipal solid waste (MSW) combustion emits various air pollutants such as particulate matter, hydrogen chloride, dioxins/furans, heavy metals (lead, cadmium, and mercury), sulfur dioxide, and nitrogen oxides. One of these comments cited public health resources and records of public concern, including testimony and background on: 1) New Hampshire House Bill 358<sup>1</sup>; 2) petitioners' "Response to

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<sup>1</sup> Relative to combustion of wood residue at municipal waste combustors. NH HB 358, 2019 Regular Session. (N.H. 2019). <https://legiscan.com/NH/bill/HB358/2019>

EPA Order, Wheelabrator Concord Company, Permit No. TV-0032;” 3) the Seventh Biennial Report from the International Joint Commission on the Great Lakes Water Quality Agreement of 1978; 4) EPA’s Summary of Executive Order 13045 - “Protection of Children From Environmental Health Risks and Safety Risks;” 5) a presentation by the New Hampshire Division of Public Health Services entitled “Childhood Lead Poisoning in NH - The Economic Burden;” and 6) the State of New Hampshire Air Quality 2017 Executive Edition report. The comment emphasized the toxicity of lead exposure, its impact on children, and the resulting economic burden.

However, neither of these comments mention EPA’s 2016 final rulemaking, entitled “Additions to List of Categorical Non-Waste Fuels,” which requires processed C&D wood to remove contaminants in accordance with best management practices at 40 CFR 241.4(a)(5). Sorting by trained operators excludes or removes the following materials from the final product fuel: non-wood materials (e.g., polyvinyl chloride and other plastics, drywall, concrete, aggregates, dirt, and asbestos), and wood treated with creosote, pentachlorophenol, chromated copper arsenate, or other copper, chromium, or arsenical preservatives. In addition, C&D processing facilities that use positive sorting (where operators pick out desirable wood from co-mingled debris) or that receive and process positive sorted C&D wood, must either exclude all painted wood (to the extent that only de minimis quantities inherent to processing limitations may remain) from the final product fuel, use X-ray Fluorescence to ensure that painted wood included in the final product fuel does not contain lead-based paint, or require documentation that a building has been tested for and does not include lead-based paint before accepting demolition debris from that building. C&D processing facilities that use negative sorting (where operators remove contaminated or otherwise undesirable materials from co-mingled debris) must remove fines (i.e., small-sized particles that may contain relatively high concentrations of lead and other contaminants) and either remove all painted wood (to the extent that only de minimis quantities inherent to processing limitations may remain), use X-

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ray Fluorescence to detect and remove lead-painted wood, or require documentation that a building has been tested for and does not include lead-based paint before accepting demolition debris from that building. *See* 81 FR 6694.

When processed in these manners and complying with all the requirements of the categorical non-waste determination, C&D wood is no longer considered a solid waste. In the case of New Hampshire, PWR, which equates to C&D wood processed in accordance with the best management practices at 40 CFR 241.4(a)(5), is still required to be combusted within MWCs and its combustion emissions are regulated via the state plan.

EPA's 2016 final rulemaking action for "Additions to List of Categorical Non-Waste Fuels" explains that preceding its proposed rulemaking, EPA analyzed more than 220 samples of processed C&D wood from nine combustion facilities. The Agency compared the contaminant levels found in the processed C&D wood to the contaminant levels found in clean wood and biomass materials. Contaminants most likely to be present in C&D debris (arsenic, chromium, lead, mercury, chlorine, fluorine, sulfur, formaldehyde, and pentachlorophenol) were all comparable or lower in the C&D wood than in clean wood and biomass materials, with the exceptions of lead, pentachlorophenol, and formaldehyde. *See* 81 FR 6697- 6698, Table 1. As a result, EPA promulgated additional controls to adequately reduce lead and pentachlorophenol at 40 CFR 241.4(a)(5) (e.g., positive and negative sorting requirements to exclude painted woods from the combustible stream of material).<sup>2</sup>

Additionally, the commenters misunderstood EPA's own language in the NPRM for this rulemaking. Section III, entitled "Why does EPA regulate air emissions from MWCs?", refers to why EPA regulates air emissions from MWCs. Unregulated combustion of MSW emits various air pollutants that are detrimental to human health and the environment. Therefore, EPA regulates

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<sup>2</sup> For the pollutant formaldehyde, EPA concluded that proposed rules published in 2013, Formaldehyde; Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products (78 FR 34796) and Formaldehyde Emissions Standards for Composite Wood Products (78 FR 34820), would limit levels of formaldehyde in wood products and thus reduce the levels of formaldehyde in processed C&D wood. These rules were finalized by EPA on December 12, 2016, at 40 CFR 770 to implement the Formaldehyde Standards for Composite Wood Products Act, which added Title VI to the Toxic Substances Control Act (TSCA).

these emissions under CAA sections 111(d) and 129 to protect human health and the environment. C&D wood itself is identified as not being a solid waste when used as fuel in a combustion unit and processed in the required manner at 40 CFR Part 241.4, Non-Waste Determinations for Specific Non-Hazardous Secondary Materials When Used as a Fuel. A non-waste, non-hazardous secondary material cannot be identified as MSW, and the emitted pollutants from combustion of these materials are also not identical to and should not be characterized as such.

Regarding the regulatory process, a commenter stated that New Hampshire citizens “face barriers to public participation and access to resolution on issues that are provided for the public” at the state level. NHDES provided adequate opportunities for public participation throughout the state rulemaking process to amend New Hampshire Code of Administrative Rules Env-A 3300 Municipal Waste Combustion. The rulemaking process initiated in 2016 was introduced by the NHDES Air Resources Division and the Solid Waste Division at multiple stakeholder meetings open to the public with opportunities for comment. The proposed rule was presented to the NHDES Air Resources Council on September 11, 2017, and the final rule was posted for notice on May 14, 2018, with a public hearing on June 15, 2018, and a comment period ending on June 29, 2018.

There also were comments regarding the administration of the NHDES Air Resources Division, specifically concerning Title V operating permit shields, reporting of emissions, nitrogen oxides (NO<sub>x</sub>) emissions compliance, and a general lack of monitoring. EPA finds these comments to be outside the scope of this rulemaking and thus no response to those comments is necessary.

Moreover, suggestions from both commenters to reject the state plan and continue the ban on PWR combustion are outside the scope of EPA Region 1’s jurisdiction and this particular rulemaking. NHDES has the authority to incorporate standards in its state plan that are at least as protective as Federal emission guidelines. The state plan revision does not contradict or contravene 40 CFR Part 60, Subpart Cb, Emission Guidelines and Compliance Times for Large Municipal Waste Combustors That are Constructed on or Before September 20, 1994, or 40 CFR Part 241,

Subpart B, Identification of Non-Hazardous Secondary Materials that are Solid Wastes when Used as Fuels or Ingredients in Combustion Units.

Finally, a comment stated that our proposed approval of New Hampshire's regulation is inconsistent with the requirements of Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. EPA disagrees with the commenter. This executive order was issued by President William J. Clinton in 1997. The order applies to *economically significant rules under Executive Order 12866* that concern an environmental health or safety risk that EPA has reason to believe may disproportionately affect children. Environmental health risks or safety risks refer to risks to health or to safety that are attributable to products or substances that the child is likely to come in contact with or ingest (such as the air we breathe, the food we eat, the water we drink or use for recreation, the soil we live on, and the products we use or are exposed to). When promulgating a rule of this description, EPA must evaluate the effects of the planned regulation on children and explain why the regulation is preferable to potentially effective and reasonably feasible alternative. Executive Order 12866 defines "significant regulatory action" as one which generally is any regulatory action that is likely to result in a rule that may:

- Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

EPA has determined that the criteria above have not been met for this rulemaking.



### **III. Final Action**

EPA is approving NHDES's CAA sections 111(d)/129 revised state plan for existing large and small MWCs.

### **IV. Incorporation by Reference**

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the State of New Hampshire amended Code of Administrative Rules Env-A 3300, Municipal Waste Combustion, with a state effective date of September 27, 2018. The amended Env-A 3300 applies to Large and Small Municipal Waste Combustors to comply with section 111(d) and section 129 of the Clean Air Act. EPA has made, and will continue to make, these documents generally available through <https://www.regulations.gov> and at EPA Region 1 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). This incorporation by reference is approved by the Director of the Federal Register upon the effective date of this final rule, and the plan is federally enforceable under the CAA as of the effective date of this final rulemaking.

### **V. Statutory and Executive Order Reviews**

Under the Clean Air Act, the Administrator is required to approve a state plan submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing state plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the state plan is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65

FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* 42 U.S.C. 7607(b)(2).

### **List of Subjects in 40 CFR Part 62**

Environmental protection, Air pollution control, Administrative practice and procedure, Incorporation by reference, Industrial facilities, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides, Waste treatment and disposal.

Dated: December 6, 2022.

David Cash,  
Regional Administrator,  
EPA Region 1.

Part 62 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

**PART 62 – APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS**

1. The authority citation for part 62 continues to read as follows:

**Authority:** 42 U.S.C. 7401 et seq.

**Subpart EE – New Hampshire**

2. Section § 62.7325 is amended by adding paragraphs (b)(4)(iii) and (d) to read as follows:

**§ 62.7325 Identification of plan.**

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(iii) Revised State Plan for Large and Small Municipal Waste Combustors was submitted on October 1, 2018. Revisions included amendments to New Hampshire Code of Administrative Rules Env-A 3300 Municipal Waste Combustion in response to a change in the state statute relative to “Devices Contributing to Air Pollution” enacted by the New Hampshire General Court in 2016 and codified at New Hampshire Revised Statutes Annotated 125-C:10-c, that incorporates fuel quality standards and test methods for Large MWCs that combust processed wood residue from construction and demolition debris. The plan includes revisions to the regulatory provisions cited in paragraph (d) of this section, which EPA incorporates by reference.

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(d) *Incorporation by reference.* (1) The material incorporated by reference in this section was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a)

and 1 CFR part 51. You may obtain copies at the EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square-Suite 100, Boston, MA, 617-918-1111 and from the source listed in paragraph (d)(2) of this section. You may also inspect the materials at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email [fr.inspection@nara.gov](mailto:fr.inspection@nara.gov), or go to: [www.archives.gov/federal-register/cfr/ibr-locations.html](http://www.archives.gov/federal-register/cfr/ibr-locations.html).

(2) State of New Hampshire, New Hampshire Department of Environmental Services, 29 Hazen Drive, Concord, NH 03302, 603-271-3503, <https://www.des.nh.gov/rules-and-regulatory/administrative-rules>.

(i) New Hampshire Code of Administrative Rules Env-A 3300, “Municipal Waste Combustion,” effective September 27, 2018.

(ii) [Reserved]